

N.D.A.G. Letter to Berg (March 9, 1988)

March 9, 1988

Mr. Bradley Berg
Hatton City Attorney
Onstad Twichell
West Caledonia Avenue
P.O. Box 207
Hillsboro, ND 58045-0207

Dear Mr. Berg:

Thank you for your letter of February 8, 1988, posing three questions as to a proposed water main replacement project within the City of Hatton. I appreciate receiving your legal analysis as well as that of Mr. Lawrence.

You first inquire whether the decision to proceed with the water main replacement project is a discretionary decision of the city council or whether the council is obligated to follow the results of the advisory vote which occurred on the project. It appears that the council has proceeded with this project despite the results of an advisory vote.

Enclosed is a copy of a letter written to Ward County State's Attorney Slorby on the issue of advisory votes or straw votes as they have sometimes been called. Although the discussion in this opinion is not directly on point with the question you have posed, the authorities noted in the letter are unanimous in their description of these straw or advisory votes as nonbinding and without legal effect. I believe these conclusions answer your question. The advisory vote which occurred is not binding upon the council and the council is not obligated by the results of that advisory vote.

Your second question is whether N.D.C.C. § 40-33-02 applies to the proposed water main replacement project. This statute requires approval by the city electors before the city purchases, erects, or substantially enlarges, improves, or extends "an existing plant" or before the city leases from another "any plant, system, or line provided for in section 40-33-01." It is not clear whether the term "plant" as used in this section is limited to electric light and power plants (N.D.C.C. § 40-33-01(1)), telephone plants (N.D.C.C. § 40-33-01(4)), and gas pipeline transmission or distribution plants (N.D.C.C. § 40-33-01(7)). If the term "plant", as used in N.D.C.C. § 40-33-02, refers only to those plants just described, the term would not apply to a water main distribution system.

In the latter half of N.D.C.C. § 40-33-02, exceptions are provided to the city elector approval. Those exceptions are as follows:

1. The cost of any enlargement, improvement, or extension which will be paid out of the earnings of a plant and the cost does not exceed

the sum of \$5,000.

2. Eighty percent or more of the cost of any water works, mains, water system and equipment or appliances therefore, to be paid by special assessments or by the earnings of the plant or by both.

Where either of these circumstances are present, the statute states that "it shall be unnecessary to submit the proposition to the electors of the municipality."

It is the second exception with respect to the cost of water works, mains, water system and the equipment or appliance therefore which is helpful in determining the scope of the term "plant". If plant did not include water works, mains, and water system or equipment, there would have been no need for the Legislature to provide a specific exception from the city elector approval requirement for such projects. If such water works project were not subject to the voter approval provisions of this chapter, an exception for such projects would have been useless rhetoric on the part of the Legislature. By its inclusion of the water work projects exception where the costs of same does not exceed a certain percentage, the Legislature obviously was of the mind that such projects were otherwise subject to the city elector approval requirements. We cannot interpret the second exception of N.D.C.C. § 40-33-02 as an exercise in idleness or useless rhetoric on the Legislature's part. Keys v. Amundson, 343 N.W.2d 78 (N.D. 1983); State v. Nordquist, 309 N.W.2d 109 (N.D. 1981).

Thus, my opinion is that the term "plant" as used in the first sentence of N.D.C.C. § 40-33-02 does include water works, mains, water system and equipment and appliances connected therewith.

Having concluded that N.D.C.C. § 40-33-02 applies to the proposed city of Hatton water main replacement project, your third question is whether the phrase "cost of any water works, main, water system and equipment" as provided for N.D.C.C. § 40-33-02 refers to the cost borne by the city or to the total project cost. In the case of the city of Hatton water main replacement project, the city is responsible for \$800,000 of the total cost. The additional \$400,000 is being paid by a grant from the federal Farmers Home Administration. Your question becomes critical in determining whether the second exception from the city elector approval requirement applies. If 80% or more of the cost of the water work project is to be paid for by the plant's earnings, the statute states that the project does not have to be submitted to the electors for approval. If the 80% test is not met, voter approval is required.

In calculating the cost for the purpose of the 80% test, it is significant to note that the same legislative act (1947 N.D. Sess. Laws Ch. 280) which added the 80% test as an exception to the requirement for an election also amended N.D.C.C. § 40-33-02 to provide that, regardless of cost, if the improvement was to be paid for in cooperation with either the state or the federal government, no election was necessary if the city had the funds to pay for its share of the cooperative venture or for the entire cost in its municipal utilities fund. In other words, the actual cost of the improvement was not relevant if the city

already had the funds available to pay that cost. It seems reasonable then that funds available to pay for the improvement should not be taken into account in applying the 80% test to determine whether an election is necessary and it is my conclusion and opinion that the \$400,000 grant should not be included as part of the cost of the improvement for this purpose. Thus, in the situation described in your letter, the cost of the waterworks project would be \$800,000 rather than \$1,200,000.

I hope this information is helpful to you.

Sincerely,

Nicholas J. Spaeth

vkk

cc: Gary Lawrence